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No. 12

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OCTOBER TERM, 1952

FEDERAL POWER COMMISSION, PETITIONER

v.

IDAHO POWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL POWER COMMISSION

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In view of the reliance by the Court of Appeals (R. 11) and respondent (Brief, pp. 42–44) upon certain excerpts from the testimony of Mr. Dozier DeVane before the Congressional committees considering the bills which became the Federal Power Act of 1935, it may be helpful to the Court to examine this testimony in the context in which it was given.

I

The Wheeler-Rayburn bill, which was enacted into law on August 26, 1935, was introduced in the Senate and House on February 6, 1935. (S. 1725 and H. R. 5423, 74th Cong., 1st Sess.) Section

202 (a) of the bill, as introduced in Congress, provided in pertinent part as follows:

> SEC. 202 (a). It shall be the duty of every public utility to furnish energy to, exchange energy with, and transmit energy for any person upon reasonable request therefor * * *[1]

Section 202 (a), sometimes described in the hearings as the "common carrier" provision, was eliminated by both the Senate and House committees when they reported the bill on May 13, 1935, and June 24, 1935, respectively. S. Rep. No. 621, 74th Cong., 1st Sess., p. 19; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 27–28. However, the provision was in the bill in the above-quoted form when Mr. DeVane testified before the House committee on March 9, 12, and 13, 1935, and before the Senate committee on April 19, 1935.

II

Mr. DeVane's testimony before the House committee,[2] so far as pertinent to this case, was as follows:

> The CHAIRMAN [Mr. RAYBURN]. The Committee will come to order.
>
> We have this morning Mr. DeVane, solicitor for the Federal Power Commission,

[1] The bill defined "person" to mean "an individual or a corporation." Section 3 (4).

[2] *Hearings before House Interstate and Foreign Commerce Committee*, 74th Cong., 1st Sess., on H. R. 5423.

who will attempt to explain the provisions of title II of the bill.

Mr. DEVANE. Mr. Chairman and members of the committee, it is my understanding that at the conclusion of the hearing on yesterday your chairman announced that he would like for the hearing this morning to start with an explanation of title II of the bill; first, with an explanation of the amendments to the Federal Water Power Act—or whether he made that announcement himself or not, that is the way I prefer to present it and secondly an explanation of title II of title II. [p. 449]

* * * * *

The CHAIRMAN. All right, you may proceed, Mr. DeVane.

Mr. MAPES. May I ask a question for information?

The CHAIRMAN. Yes.

Mr. MAPES. Until we get down to title II of title II of the bill, the provisions in this bill, in title II, that is in title I of II are amendments to the present Federal Water Power Act?

Mr. DEVANE. That is correct, sir.

Mr. MAPES. And, title II and title III of title II, are they entirely new matters?

Mr. DEVANE. Entirely new matters.

Mr. MAPES. And you are not proposing to amend the licensing section or provisions of the Water Power Act?

Mr. DEVANE. The new matter makes no amendments to the licensing sections of the Water Power Act.

In title III of the present act have been brought forward some of the provisions that are purely administrative in character that now appear in the Federal Water Power Act, and as I read those provisions I will explain how they are handled. [p. 450]

* * * * *

Mr. COOPER. Does the present act provide that one company can connect up with another's gas line?

Mr. DEVANE. You are talking about the new part of it? You are talking about title II of title II?

Mr. COOPER. This is in title I.

Mr. DEVANE. Title I?

Mr. COOPER. Title I. When you get to title II, I would like to ask some questions.

Mr. DEVANE. This is title II. We are talking about the Federal Water Power Act. [p. 477]

* * * * *

Mr. COOPER. I may as well ask my question, what I was going to ask, because it is bearing right on the thing that has been discussed here.

You will have to excuse me, if I am not clear, because I am not a lawyer. But, if you grant a license to the State or municipality, under title II, have you got the same regulatory power over that State or municipality that you have over a private company?

Mr. DEVANE. As to rates and supervision, and so forth.

Mr. COOPER. Yes.

Mr. DEVANE. We have the power that is given us by sections 19 and 20 of the Federal Water Power Act; yes, sir.

Mr. COOPER. Well, the powers are very broad in respect to regulating a private corporation.

Mr. DEVANE. Well now, the powers——

The CHAIRMAN. Let us have order, please. Even the Chair cannot hear what is being said.

Mr. DEVANE. The powers given under title II of title II has no application to that case, if that is what you have in mind.

The power over interstate rates is given under title II of title II. Now, title II, I am going to discuss in a little while, has no application whatever to municipalities, if that is the matter you are asking about.

Mr. COOPER. Why not?

Mr. DEVANE. Because it is so drawn as not to have any application.

Mr. COOPER. Well, why?

Mr. DEVANE. Why is it so drawn as not to have any application to it?

Mr. COOPER. Yes.

Mr. DEVANE. Because in the preparation of this bill it was our judgment that the regulatory provisions as we proposed them should not extend to municipalities or Government projects.

Mr. COOPER. Well, now, I asked a question yesterday of the Commissioner if,

under this bill, the Commission had the power to supervise and regulate the T. V. A.

Mr. DEVANE. Yes.

Mr. COOPER. And he frankly stated no.

Mr. DEVAN. Yes.

Mr. COOPER. Now, you come here this morning and say that you have no power to regulate municipalities or States.

Mr. DEVANE. Or the Tennessee Valley Authority.

Mr. COOPER. Or the Tennessee Valley Authority.

Mr. DEVANE. That is right.

Mr. COOPER. Well, if you are going to apply all of these regulations and supervisions to the operation of private companies, what chance have they got to compete against municipalities, or States, or the Federal Government? Is that fair?

Mr. DEVANE. Well now, of course, I would rather not discuss it at this time, if I may reserve to a later time discussion as to whether or not that is fair, because I think——

Mr. COOPER. Will you answer why they should not come under supervision?

Mr. DEVANE. Why they should not come under the supervision?

Mr. COOPER. Yes.

Mr. DEVANE. Insofar as municipalities are concerned, they have never been, and we do not see any reason why we should ask Congress to give the Federal Power

Commission jurisdiction over their properties.

Mr. COOPER. Well, if they engage in interstate commerce.

Mr. DEVANE. They are a governmental agency of a nature and a class, and we see no reason why we should ask Congress to extend our power over them.

There is also, of course, the question as to whether or not in that respect Congress would have the power.

Now, you have the power over licensees, because there you have the complete control of the subject matter, and you can say to a State or a city, or anybody else, "Keep off these navigable waters," or, "Come on them under certain conditions," but insofar as the power to regulate the charges, I know of no instance where Congress has ever done that, and while I have not given the question any consideration, I seriously doubt the power of Congress to regulate these municipalities. It has the power to regulate them insofar as the Federal water power is concerned, and the Water Power Act is concerned, and that power is not being touched by this proposed law. [pp. 478–480]

* * * * *

Mr. DEVANE. Now, with that, unless there are some questions in connection with the other amendments to the act, I will be glad to pass to title II of title II of this bill.

The CHAIRMAN. All right, go ahead. [pp. 490–491]

* * * * *

Mr. DEVANE. Now, passing from the question of rates, we go to the question of jurisdiction over facilities and over securities, and over acquisitions and sales of property.

Those sections in the act may be considered together without dealing with them separately in detail.

The Commission is given under section 202 and section 203 of the bill the duty of attempting to bring these systems into district and integrated systems, the purpose being to provide the best and cheapest service that can be provided for the public. If that is to be accomplished. and to my mind, that is the most important part of this bill, the provision that authorizes the Commission to compel interconnections between these systems, and make the power available where it is needed—I say if that is to be accomplished, then, this Commission must have certain jurisdiction over facilities and jurisdiction over acquisition of property, and jursdiction over securities. [p. 501]

* * * * *

Mr. WOLVERTON. I would like to ask a question. It is prompted by the questions asked by Mr. Cooper yesterday. I would have liked to follow his questions and your answers at that time, but unfortunately I was unable to do so.

You stated in answer to a question of Mr. Cooper, that we will hear presented before this hearing is concluded, the same objections as were used when legislation was presented for regulation of railroads by the Interstate Commerce Act, and the regulation of the telephone and telegraph companies.

Do you think that such legislation is comparable to that presented in this bill?

Mr. DEVANE. You mean, do I think the legislation, insofar as it affects those companies, is comparable to this legislation, insofar as it affects the power companies?

Mr. WOLVERTON. Yes.

Mr. DEVANE. Mr. Wolverton, I think the legislation we are proposing here, insofar as this industry is concerned, is the best piece of legislation that has ever been proposed as a regulatory measure. I think it is far better than the Interstate Commerce Act. I think it is better than the Communications Act, and I am going to try to tell you why, before I get through, if I am permitted to do so. [pp. 512–513.]

* * * * *

Mr. WOLVERTON. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?

Mr. DEVANE. No, sir; and I want to make that very definite; and if there is any

doubt about it, so far as I am concerned, such amendment might be made as to make it clear. We have attempted in this bill, Mr. Wolverton, to accomplish these two purposes: One is not to supersede, but aid State regulation; and insofar as rates are concerned, to deal only with rates that State Commissions cannot regulate.

We have, insofar as State, municipal, or Government projects are concerned, excluded them from the jurisdiction of the Commission or from coming under this act. We have been earnest and honest in our effort to accomplish this result. We think we have done it. If we have not and it is the desire of Congress not to bring Government projects under the jurisdiction of the Commission, or give the municipal or governmental projects the right to use the transmission lines of private industry—and we have not succeeded in making that clear in this bill—an amendment should be proposed that will do it better. It will receive our hearty endorsement.

Mr. WOLVERTON. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance: Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has con-

structed a plant, but has no transmission lines, utilize the system of transmission lines constructed by the private company?

Mr. DEVANE. No, sir.

Mr. WOLVERTON. Then, you do not think that the power given in this bill to the Federal Power Commission would enable it to direct that those transmission lines be so used?

Mr. DEVANE. Mr. Wolverton, my answer to that is this: That if there is any doubt about it and this committee can remove that doubt by additional words in this bill, let us put them in.

Mr. WOLVERTON. I do not think that anybody could be more anxious to be fair.

Yesterday you suggested an amendment with respect to rates that cleared up a situation which was not clear until you offered the amendment; and your willingness to suggest an amendment of that kind, if the committee deems it necessary, indicates your sincere effort to have no doubt as to the meaning of the language used.

Mr. DEVANE. I am sincere in all I say to you in connection with that matter. We are not attempting to get control in any manner of municipal, State, or Federal projects, or the energy produced by those projects. That is the Commission's position. The chairman of the Commission just stated to me that I could announce that is the Commission's position in this matter.

Mr. WOLVERTON. May I ask, did you participate in the drawing of this bill?

Mr. DEVANE. Of title II of title II?

Mr. WOLVERTON. Yes.

Mr. DEVANE. Yes, sir; I participated in it, in making suggestions. I worked on it some; yes, sir. [pp. 514–515]

* * * * *

Mr. MAPES. Would the common-carrier provision of the bill work principally to the advantage of municipally owned and governmentally-owned projects, or to the advantage of privately owned projects?

Mr. DEVANE. The common-carrier principle that is contained in this bill is intended for the private plant insofar as compulsion is concerned.

Mr. MAPES. Is it the purpose to compel the privately owned transmission companies to carry the energy of municipal projects as well as private projects?

Mr. DEVANE. No, sir; I thought I had made that very clear. If I did not, I want to make it very clear now. It is not intended to give the Commission power to require the private lines to take on any power generated by municipal plants or by any Government plant.

Now, that is a policy for Congress to determine; but so far as the Federal Power Commission is concerned, it is not asking or seeking that authority, and this bill does not propose to give the Commission any jurisdiction over that kind of a case.

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MR. LEA. Has there been any consideration of the question as to whether or not the regulation of rates, both of Government and private concerns, should be unified in one body?

MR. DeVANE. No, sir; not on my part, and not on the part of the Commission insofar as I know.

The activities of the other Governmental agencies are matters that belong entirely to Congress and as I explained when the question was up before, we felt that we had no right to come here and ask to be given power over another governmental agency created by Congress.

MR. LEA. Yes. I can realize the attitude of your Commission in that respect, because it would not be for them to ask for that. From the standpoint of policy of Congress, I was interested to know whether that problem has been considered.

MR. DeVANE. No, sir; not so far as my work with the Commission is concerned; it has never been a matter of consideration or discussion. The only thing that we have discussed is the desirability of making it perfectly clear in this law that it is not the intention of this law to reach out and get control of that power nor is it the intention of this law to authorize this Commission to require the transmission of that power on the lines of these private operating companies. (p. 559)

Mr. MAPES. The Commission does not propose it; and in your opinion the bill does not allow it?

Mr. DEVANE. The bill does not, and if there is any doubt about it, the bill should be amended in that respect, and I have promised to try to draw other language that will accomplish it. [p. 546]

* * * * *

III

Mr. DeVane's testimony before the Senate committee,[3] so far as pertinent, was as follows:

The CHAIRMAN [Senator WHEELER]. All right. Mr. DeVane, do you have a statement prepared that you wish to make to the committee?

Mr. DEVANE. I am here, Mr. Chairman, to discuss title II of the Wheeler bill, S. 1725.

The CHAIRMAN. Will you please speak up loud enough so that everyone in the room may hear you?

Mr. DEVANE. Mr. Corcoran explained to you yesterday how title I was prepared and its purpose. He also made reference to the fact that title II of the bill was prepared by the Federal Power Commission, and as Solicitor for that Commission I participated in the preparation of title II of the bill.

The CHAIRMAN. You may proceed.

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[3] *Hearings before Senate Committee on Interstate Commerce*, 74th Cong., 1st Sess., on S. 1725.

Senator WHITE. Let me ask you right there: At what page of the bill does title II begin?

Mr. DEVANE. It begins on page 78 of the Wheeler bill. The title II that I referred to, however, begins on page 104 with section 201. On page 78 of the bill there is proposed certain amendments to certain sections of the Federal Water Power Act. Section 212, on page 104, provides that sections 1 to 29, inclusive, of the Federal Water Power Act, as amended, shall constitute title I of that act. And section 213, on page 104 of this bill, provides that the Federal Water Power Act, as amended, shall be further amended by adding thereto titles II and III.

I mention this so that there may be no confusion as to the reason for the two separate designations of title II, on pages 78 and 104 of the bill.

The second title II, beginning at page 104 of the bill, provides for the regulation of the transmission and sale of electric energy in interstate commerce. [pp. 223-224]

* * * * *

Mr. DEVANE. I might say in connection with the proposed amendments to the Federal Water Power Act——

Senator HASTINGS (interposing). Is that the second title II?

Mr. DEVANE. That is title II, beginning at page 78 of the bill.

Senator HASTINGS. Are they proposed as amendments to the Water Power Act?

Mr. DEVANE. Yes, sir. Beginning on page 78 of the bill are proposed amendments to the Federal Water Power Act. And these proposed amendments go from page 78 to page 104 of the bill. These amendments are, perhaps I might say, self-explanatory; they are the result of the experience of the Federal Power Commission in the administration of the act.

Senator WHITE. May I ask you a question right there?

Mr. DEVANE. Certainly.

Senator WHITE. Are these proposed amendments to this title II necessary in order to make effective title I of the bill, or are they just something additional and distinct from the proposals contained in title I of the bill?

Mr. DEVANE. They have no relation either to title I of the bill or to the second title II. What I mean by the——

Senator WHITE (interposing). Then this is a sort of omnibus bill?

Mr. DEVANE. What I mean by that is this: That the amendments of the Federal Water Power Act are offered as amendments that should be made to that act without regard to what is done with title I or the second title II of the bill. [pp. 232–233]

* * * * *

Mr. DEVANE. I wish also to make it clear at the outset that title II of this bill is

applicable to the private utilities only. There was a typographical error in section 201 in the House bill, which indicated that the power over rates might extend further than we stated that it was the purpose of the legislation to go. Section 201 of this bill is clear on this subject. The error was not committed in this copy, so this is all right.

The CHAIRMAN. The Senate generally makes fewer mistakes than the House.

Senator HASTINGS. You mean it does not apply to a publicly owned power plant?

Mr. DEVANE. It does not apply to a publicly owned power plant.

Senator HASTINGS. Although it transmits its power across State lines?

Mr. DEVANE. Although it transmits its power across State lines.

Senator HASTINGS. Why is that?

Mr. DEVANE. Because it has not been drawn to include public plants.

Senator HASTINGS. Why was it not drawn that way?

Mr. DEVANE. We did not feel that it was within our province to prepare a bill that would undertake to regulate municipal, State, or Government utilities. [pp. 255–256]

* * * * *

Senator HASTINGS. Do you undertake to regulate the power created by the Tennessee Valley Authority?

Mr. DEVANE. No, sir.

Senator HASTINGS. Why is not that done?

Mr. DEVANE. Insofar as all governmental projects are concerned, our approach to the matter was that in the legislation creating those authorities and giving those authorities their powers, this Congress had provided the power that it wanted those agencies to have, and it did not seem to us that it was proper to attempt to bring those other governmental agencies under the regulation of the Federal Power Commission; so that in our preparation of this bill we have left them out, and they are outside the pale of this bill.

Senator BARKLEY. On the theory that it is not necessary for the Government to regulate itself?

Mr. DEVANE. That is right.

Senator HASTINGS. I am not at all certain that that theory is correct.

Mr. DEVANE. The industry will probably appear before you and say that the Federal Power Commission is given the power under this bill to make the private utilities take Government power from these projects—that we have the authority to require physical connection and to make them purchase power. I just want to make it clear before they start on that that the bill itself does not give the Commission that authority, and our intention in the preparation of the bill was not to give the Commission that authority. If there is any doubt about

it, a clarifying amendment should be put in if it is the view of the Congress that the authority should not be given. But it is not the intention of this bill to do that. [pp. 256–257]

* * * * *

Mr. DEVANE. I would like to enumerate the several objectives of the bill. They are as follows:

(1) Jurisdiction over all electric utilities engaged in interstate commerce and over the wholesale rates of such utilities.

(2) Authority to establish regional districts for the control of the production and transmission of electric energy. The bill provides for voluntary coordination under the supervision and direction of the Commission of the privately- and publicly-owned electric facilities in the several districts and as to the privately-owned facilities, the Commission is given authority to require physical connection and the purchase, sale or interchange of power.

(3) The Commission is given control over additions, betterments, and abandonments of interstate transmission lines and of generating facilities used in connection with such lines. No jurisdiction is given to the Commission over transmission lines used in intrastate commerce or over distribution facilities or generation facilities that are used exclusively for intrastate commerce. [pp. 257–258]

* * * * *

Senator HASTINGS. May I inquire what is there about this title II that the industry does object to?

Mr. DEVANE. I can tell you what they tell us they object to. I think title II, from their standpoint, is important, and they may look upon it as serious regulation. They object very much to section 202 (a), which makes their lines common carriers. They object very seriously to any authority that would make them purchase or transport power from a public project, which is not in the bill but to which they devoted a great deal of their time at the House hearings. Those, as I recall, are the two chief attacks that they made on title II.

The CHAIRMAN. Let me understand you. You say that there is nothing in the bill which compels them to transport power of a public project over their lines. Am I correct in that?

Mr. DEVANE. That is right, sir.

The CHAIRMAN. So that there is no use of their wasting any time with reference to that phase of it; and if you are agreed with them with reference to it, it seems to me that if it is not clear, if they have an amendment which will cover that, that would end it. [p. 260]

* * * * *

Mr. DEVANE. I should like to address myself to just a few of the specific sections of title II. First, I would like to refer to section 202–A, on page 105 of the bill. That section introduces into this bill what

is generally referred to as the common-carrier principle. That is, it would not only authorize the Commission to require interconnection between these systems, but would likewise authorize the Commission to make a utility transport energy for another utility.

A very serious objection has been made to that provision by the industry. The objection, however, is made on the ground that the bill authorizes the Commission to require these private systems to transport Government power, and they have used that section as the basis for their claim that this is a bill to nationalize the industry and is merely the first step in Government ownership. I do not know what their claim will be here before this committee, but they have had a great deal to say about that before the House committee.

Senator MINTON. Are you still talking about section 202–A?

Mr. DEVANE. Yes. [pp. 270–271]

* * * * *

IV

The Senate committee reported favorably on the bill (S. 1725) on May 13, 1935, but in view of the extensive amendments proposed, the committee thought it advisable to report a substitute bill (S. 2796). S. Rep. No. 621, 74th Cong., 1st Sess., p. 1. The committee report (p. 19) made the following comments on Section 202 (a):

Section 202 (a) of S. 1725 imposed upon each public utility the duty to furnish energy to, exchange energy with and transmit energy for any person upon reasonable request. This provision has been eliminated, and the other subsections of the old section 202 which relate to rates have been removed to the general rate section (sec. 205). While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202 (a) (formerly sec. 203 (a)) for the first Federal effort in this direction. The authority to compel utilities to establish physical connection with the facilities of other companies and to sell and exchange energy, now contained in section 202 (b), has been limited to cases instituted by complaint of a State commission or a public utility and to cases in which both parties to the order are interstate utilities.

In addition, the committee proposed a new provision, Section 201 (e), which as finally enacted became Section 201 (f). That provision reads:

> No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing * * *.

The committee report stated with respect to this provision:

> A new subsection (e) has been added to remove all doubt that the act is not to apply to public projects, Federal, State or municipal. Despite repeated assurances by representatives of the Federal Power Commission that no such authority was intended, the charge was frequently made that the bill as originally introduced authorized the Commission to compel private utilities to establish connection or exchange power with public plants. This new subsection carries out in unmistakable terms the original intention of the bill in this respect. [p. 19]
>
> * * * * *
>
> Subsection (e) expressly excludes from the operation of the act the United States, the States, municipalities, and all of their agencies. It is designed to make perfectly clear that no compulsory powers may be exerted upon public projects or upon privately owned projects for the benefit of public plants. [p. 49]
>
> * * * * *

The same amendments were proposed, with similar comments, in the House report. H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 27–28.

V

The House and Senate committee reports state the following with respect to the amendments

to the Federal Water Power Act contained in "Title I of Title II" of the bill (which was later redesignated "Part I" of the Act):

> The amendments to the present Federal Water Power Act have been requested by the Federal Power Commission on the basis of its experience in the administration of that Act. Most of them are designed merely to clarify the Act in its application to situations that have arisen in its administration. [Sen. Rep. No. 621, 74th Cong., 1st sess., p. 17]
>
> * * * * *
>
> The amendments to the present Federal Water Power Act are all minor. They have been requested by the Federal Power Commission, largely for the purpose of clarifying the Act in its application to situations that have arisen in its administration, and also to strengthen it in certain particulars. [H. Rep. No. 1318, 74th Cong., 1st sess., p. 7]

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.
PHILIP ELMAN,
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BRADFORD ROSS,
General Counsel,
Federal Power Commission.

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